COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

NO. ______________

CUMMINGS PROPERTIES, LLC Plaintiff-Appellee

v.

DARRYL C. HINES, Defendant-Appellant.

Appeal from Superior Court Department of the Trial Court (Middlesex) C.A. No. 2081-CV-00025

-and-

Decision of the Appeals Court
Case No. 21-P-1153

CUMMINGS PROPERTIES, LLC'S APPLICATION FOR FURTHER APPELLATE REVIEW

Joseph P. Mingolla, BBO #631287
Counsel for Plaintiff
Cummings Properties, LLC
200 West Cummings Park
Woburn, Massachusetts 01801
781-935-8000
legal@cummings.com

Dated: December 20, 2022

S.J.C. Rule 1:21 Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, Cummings Properties, LLC hereby states that it is owned by Cummings Holdings Trust, a Massachusetts business trust, organized under the laws of the Commonwealth of Massachusetts and having a principal place of business at 200 West Cummings Park, Woburn, Massachusetts 01801.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, the Plaintiff-Appellee, Cummings Properties, LLC ("Cummings"), hereby applies to the Supreme Judicial Court for further appellate review of the Appeals Court's December 5, 2022 opinion reversing the Superior Court's ruling in Cummings's favor with respect to the enforceability of the liquidated damages in the commercial lease between Cummings and the corporate entity of which the Defendant-Appellant, Darryl C. Hines ("Hines"), was the principal.[1]

Further appellate review is warranted for two principal reasons, each of which affects both the public interest and the interests of justice. First, the ruling directly conflicts with what the Superior Court characterized as a "seminal case [of the SJC] concerning liquidated damages," see Add. at 53, in which the SJC upheld a nearly identical liquidated damages provision found in a commercial lease with the same lessor. *See Cummings Properties, LLC v. National Communications Corp.*, 449 Mass. 490 (2007). Indeed, the

---

[1] Copies of the Appeals Court's opinion and rescript are annexed in the Addendum hereto ("Add.") at pp. 28 - 43. A copy of the Superior Court's Decision is also annexed at Add. 45 -59.

liquidated damages provision upheld in *National Communications* and struck down in the instant case are materially the same, calling for payment of the agreed-upon rental value for the premises over the remaining life of the lease, decreasing in amount as the lease term approached expiration. *Id.* at 496-497. By ruling the provision a penalty, the Appeals Court has now cast doubt on thousands of commercial agreements that contain similar provisions since the SJC's clear pronouncement 15 years ago.

The Appeals Court's ruling also undermines settled law concerning the issue of mitigation of damages in the commercial realm. In *NPS, LLC v. Minihane*, 451 Mass. 417 (2008) the SJC - relying heavily upon its *National Communications* ruling the previous year - upheld a liquidated damages clause holding a New England Patriots season ticket holder liable for a full 10 years' worth of license fees even though the subject breach occurred after just one year, and concluded that "mitigation is irrelevant and *should not be considered in assessing damages.*" *Id.* at 423 (emphasis supplied). Notwithstanding the clarity of the SJC's pronouncements on the issue, the Appeals Court here posited that, *in order to be valid*, Cummings's liquidated damages provision would need to include "some accounting to [the breaching tenant] for any rent received from a new tenant." (Add. at 10.) Such a conclusion upsets the very "peace of mind and certainty of result" sought by parties that have contracted for liquidated damages and constitutes an impermissible "second look" at actual damages. *Kelly v. Marx*, 428 Mass. 877, 881 (1999) (invalidating the "second look" doctrine).

The foregoing errors represent fundamental departures from well-settled law governing liquidated damages in commercial contracts in the Commonwealth. Accordingly, it is in the interests of justice and public policy for the Supreme Judicial Court to review the Appeals Court's erroneous decision.

STATEMENT OF PRIOR PROCEEDINGS

This application arises from an action commenced on January 6, 2020 by Cummings against Hines in Middlesex Superior Court. The Verified Complaint sought to enforce Hines's personal and unconditional guaranty (the "Guaranty") of a commercial lease obligation owed by non-party Massachusetts Constable's Office, Inc. ("MCO"), of which Hines was the founder and president. The underlying obligation represented the balance of liquidated damages owed by MCO following its rental default under the lease.[2]

At a jury-waived trial on June 16 and 17, 2021, the Superior Court (Barry-Smith, J.) heard testimony from seven witnesses and admitted 27 exhibits. The evidence focused principally upon Hines's level of "sophistication," such that the liquidated damages provision contained in the lease could be enforced. *See National Communications*, 449 Mass. at 495 (noting the

---

[2] Following MCO's uncured rental default, Hines accepted service of a summons and complaint against MCO in a summary process action filed in Woburn District Court. The District Court entered judgment for Cummings in the amount of $74,076.24. After application of (i) the security deposit (previously paid by MCO pursuant to the lease); and (ii) additional payments made by MCO (totaling $2,726), the execution balance totaled $68,650.24 (the "Execution Balance").

"near unanimous trend toward upholding liquidated damages clauses in agreements *between sophisticated parties*") (emphasis supplied).

On August 13, 2021, the Superior Court issued its Findings of Fact, Conclusions of Law, and Order (the "Decision"), in which the Court upheld Hines's liability under the Guaranty. Specifically, the Court concluded that (i) Hines possessed the requisite degree of sophistication when he signed the lease on behalf of MCO; and (ii) the liquidated damages provision in the lease was enforceable as a matter of law. As a result, the Court found Hines liable for the Execution Balance, and directed entry of judgment in favor of Cummings.

Hines appealed the Decision to the Appeals Court. By its Opinion dated December 5, 2022, the Appeals Court concluded that the lease's liquidated damages provision was an unenforceable penalty and remanded the matter for a determination of actual damages.

This application followed.

STATEMENT OF FACTS RELEVANT TO THE APPEAL

Hines founded MCO and, at all relevant times, was its sole officer and director. (Add. at 29.) A self-taught accountant and tax preparer, Hines started MCO as a for-profit entity, but later converted it to a non-profit. (*Id.* at 46.) Under

Hines's leadership, MCO at one point managed approximately 10 constables, who worked for MCO as independent contractors. (*Id.*) In 2016, following "months of back-and-forth" with government representatives, Hines successfully negotiated a contract with the Massachusetts Department of Revenue ("DOR"). (Add. at 47; R.A. at 398.)[3] Anticipating a majority of MCO's business with DOR to originate from the agency's Woburn office, Hines sought commercial premises nearby. (*Id.*)

On April 15, 2016, Cummings entered into a lease with MCO for premises located in the same building where DOR was located. The lease required MCO to pay $1,364.50 per month for 60 months. (Add. at 47.) Hines also signed a personal guaranty ("Guaranty") of the lease, in which he "personally and unconditionally guaranteed the prompt payment of rent by [MCO] and the performance by [MCO] of all financial and nonfinancial obligations arising out of . . . th[e] lease." (Add. at 47.)

---

[3] References to "R.A." are to the Record Appendix filed with the Appeals Court.

The lease included a liquidated damages provision (the "Damages Provision"), which provided:

> If [MCO] defaults in the payment of any rent, and such default continues for 10 days after written notice thereof . . . then, in addition to any other remedies, the net present value of the entire balance of rent due . . . shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such a breach. (Add. at 48.)

DOR suspended its contract with MCO shortly after the lease had been signed. In July 2016, MCO ceased paying rent. As a result of this substantial financial default, Cummings issued a default notice to MCO in accordance with the lease. After MCO failed timely to cure its default, Hines (i) accepted service of a summary process summons and complaint and (ii) entered into a Use and Occupancy Agreement, pursuant to which MCO remained in the premises while making a series of "use and occupancy" payments pursuant to an agreed-upon schedule.[4] (Add. at 49; R.A. at 40-43, 124.)

---

[4] Hines sought to remain in possession of the premises while he sought reinstatement of the DOR contract. (Add. at 49.) The Use and Occupancy Agreement (R.A. 41-43) afforded MCO the opportunity to do so, and provided that MCO would assent to the entry of a judgment in the summary process action if use and occupancy payments were not timely made. (*Id.*) All payments made pursuant to the Use and Occupancy

MCO was unable to reinstate the DOR contract and failed to comply with the Use and Occupancy Agreement payment schedule. MCO vacated the premises in October 2016. (Add. at 49.) After applying MCO's Use and Occupancy Agreement payments (totaling $2,726) and the security deposit ($2,700), the Execution Balance was reduced to $68,650.24. (*Id.*)[5]

During the trial, the Superior Court received evidence concerning Hines's "sophistication" as a business person, which it viewed as a prerequisite for enforceability of a liquidated damages provision."[6] (Add. at 53 n.1.) After weighing the evidence, the Court determined that Hines was sufficiently sophisticated to be held to the provisions of the contract he signed. (*Id.* at 55.)

The Court also evaluated the enforceability of the Damages Provision by analyzing controlling law (including *National Communications*, a "seminal case"), and determined that the provision in Cummings's lease

---

Agreement were applied against the judgment issued by the District Court.

[5] The Appeals Court incorrectly states that MCO "later retained an attorney, who moved to vacate the summary process judgment and to recall the execution." (Add. at 32 n.1.) Although MCO's attorney drafted such a motion, he never filed it and it was never ruled upon. (R.A. 257-258.)

[6] *See National Communications*, 449 Mass. at 495.

represented a "reasonable forecast of damages expected to occur in the event of a breach":

> "Where the liquidated damages represent 'the agreed rental value of the property over the remaining life of the lease, decreasing in amount as the lease term came closer to expiration, [then] it appears to be a reasonable anticipation of damages that might accrue from the nonpayment of rent.' . . . [I]f a defendant is not required to pay more than the total amount he would have paid had he performed his obligation under the agreement, the liquidated damages provision is **not a penalty** and bears a reasonable relationship to the anticipated actual damages resulting from a breach."

(Add. at 56; quoting 449 Mass. at 496; emphasis supplied.)

In doing so, the Court determined that Hines could not sustain his burden of demonstrating that the clause was not a reasonable estimate of damages because he had offered ***no evidence*** on that issue at trial. (Add. at 57 ("that type of evidence is not before me in this case"); 58 ("the evidence in this case does not support [such a conclusion]").)[7]

[7] Rather, the only evidence upon which Hines relied in challenging the Damages Provision was that the premises had been re-leased months after MCO vacated. In view of the SJC's rejection of the "second look doctrine," *see Kelly v. Marx*, 428 Mass. 877, 881 (1999), the trial court properly concluded that such evidence of post-breach circumstances was "irrelevant" and "cannot be considered." (Add. at 58.)

POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether the Appeals Court erred in reversing the Superior Court's conclusion and invalidating the Damages Provision, where substantially the same provision was expressly *upheld* by the SJC as "a reasonable anticipation of damages that might accrue from the nonpayment of rent"? *See National Communications*, 449 Mass. at 496.
2. Whether, in view of Hines offering *no evidence* at trial on the issue on which he bore the burden of proof (i.e., whether the Damages Provision constitutes a "reasonable forecast of damages expected to occur" (*National Communications*, 449 Mass. at 494)), the Appeals Court erred in concluding that the Damages Provision constituted an unenforceable penalty?
3. Whether the Appeals Court's determination that an enforceable liquidated damages provision must include an automatic credit to a breaching tenant in the amount of "any rent received from a new tenant" conflicts with and is foreclosed by the SJC's determination in *NPS, LLC v. Minihane* that mitigation "is irrelevant and should not be considered in assessing damages"? 451 Mass. 417, 423 (2008).

4. Whether the Appeals Court's mandate of a post-breach assessment of damages upsets the very "peace of mind and certainty of result . . . sought [by the parties] when they contracted for liquidated damages," and requires them to "fully litigate (at great expense and delay) that which they sought not to litigate," in contravention of *Kelly v. Marx*, 428 Mass. 877, 881 (1999) (internal quotations and citations omitted)?

REASONS FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE APPEALS COURT'S DECISION CANNOT BE RECONCILED WITH *NATIONAL COMMUNICATIONS*, AND CREATES A CONFLICT WITH SETTLED JURISPRUDENCE CONCERNING LIQUIDATED DAMAGES.

For more than 15 years, controlling Massachusetts law has held that liquidated damages provisions in commercial agreements between sophisticated parties will be enforced unless the party challenging enforcement establishes that the amount it agreed in advance to pay was "unreasonably and grossly disproportionate" to any reasonable estimate of the damages - as of the date the agreement was executed - that might accrue, and was therefore a penalty. *See, e.g., NPS, LLC v. Minihane*, 451 Mass. 417, 421 (2008); *National Communications*, 449 Mass. 497; *TAL Fin. Corp. v. CSC Consulting, Inc.*, 446 Mass. 422, 431 (2006). These decisions recognize that liquidated or stipulated damages are necessarily predictive and are estimated (and agreed to) in advance "for peace of mind and certainty of result" in exchange for the "opportunity to determine actual damages after a breach." *Minihane*, 451 Mass. at 423. For this reason, the law prohibits "tak[ing] a 'second look' at the actual damages after the contract has been breached." *Id.* at 420.

In commercial leases, in particular, in order to sustain such burden, defaulting tenants are required to produce evidence "that at the time the lease was entered into, the parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at that time, or what the cost of finding another tenant and the length of time the property might remain vacant might be." *National Communications*, 449 Mass. at 496.

Here, Hines offered no such evidence. He offered no evidence related to the foreseeability of when a breach for nonpayment would occur, no evidence about what the commercial real estate market would be at that time, no evidence regarding the costs of attempting to relet the premises, and no evidence about the anticipated vacancy period while the premises was refurbished and a new tenant secured.

Despite this absence of evidence, and despite that Hines failed entirely to sustain his burden of establishing that the liquidated damages amount was "grossly disproportionate" to any reasonable estimate of damages that might result, the Appeals Court concluded that the agreed liquidated amount "bears no reasonable relationship to expected damages and is thus . . . a penalty." (Add. at 36.) Such conclusion cannot be reconciled with controlling law and was error.

A. The SJC Previously Upheld Virtually the Same Liquidated Damages Provision in *National Communications*, Awarding Cummings the Right to Retake the Premises *and* to Recover No More Than it Would Have Had Tenant Performed its Obligations Under the Lease.

As here, *National Communications* involved a liquidated damages provision that provided lessor the right, following an uncured rental default by lessee, to retake possession of the premises and to recover liquidated damages.[8] *National Communications*, *supra*, at 491 & n.3. In doing so, the SJC expressly upheld the provision in Cummings's lease, which required the defaulting tenant to pay the balance of the agreed rental value of the property over the remaining life of the lease (decreasing in amount as the term came closer to expiration). As such, this Court necessarily determined that the provision was a "reasonable anticipation of damages that might accrue from the nonpayment of rent." *See id.* at 496-497.

---

[8] The only substantive difference between the two provisions is that, in *National Communications,* the clause also applied to "breaches of less significance" (i.e., non-rental defaults) *id.* at 490, which the SJC adjusted to apply only to "material breaches" and then enforced. *Id.* at 490, 495-497.

The substantive and procedural similarities between *National Communications* and the instant case are patent. In each case, Cummings: (i) enforced the lease's liquidated damages provision against a defaulting tenant; (ii) in conjunction with such enforcement, regained possession of the premises (*id.* at 493); and (iii) re-leased the premises to a new tenant during the original lease term. *Id.* at 493 n.8. Moreover, in each case, the tenant failed to offer *any* "first-look" evidence to satisfy its burden of showing that the liquidated damages clause was a penalty. *Id.* at 497.

Because of this absence of evidence, the SJC in *National Communications* did *not* - in contrast to the Appeals Court here - invalidate the Damages Provision for its failure to include "either some accounting to [the tenant] for any rent received from a new tenant or some discounting of the stipulated damages to reflect the likelihood of reletting."[9] (Add. at 37.) Moreover,

---

[9] The SJC correctly upheld the liquidated damages provision in *National Communications* (as applied to "material" breaches), without also requiring, as the Appeals Court now suggests, that the provision account for all rent received from a subsequent tenant, particularly where such rental payments are presented in isolation, without any context or evidence of attendant damages such as all costs of reletting, refurbishing, tenant improvements, etc.

the *National Communications* Court was well aware that Cummings had received rent from "replacement tenants [to whom the premises had been re-let]." *Id.* at n.8. In accordance with the "no second look" paradigm, however, it did *not* require any adjustment to the liquidated damages amount to account for rental payments that were subsequently received. To the contrary, the SJC "*vacated* the award of actual damages and *reinstated the award of liquidated damages.*" *Id.* at 497-498.

B. The Appeals Court's Attempt to Distinguish *National Communications* Does Not Withstand Scrutiny.

While acknowledging that "the facts of *National Communications* are similar," the Appeals Court suggested that the SJC "did not address in that case whether a rent acceleration clause is a penalty if it allows the landlord to collect both the full amount of rent owed under the lease and rent from a new tenant." (Add. at 39-40.) As set forth *supra*, however, *both cases involved evidence of subsequent re-leasing of the subject premises*, and the principal features of the damages clauses in the cases were the same: each allowed Cummings to re-take possession of the premises *and* the possibility of collecting full liquidated damages if the departed tenant was viable. In upholding the liquidated damages provision in *National*

Communications, the SJC described it as "generat[ing] an amount of damages that varies depending on the point in the life of the contract at which [the] breach occurs; *that amount is then used as a substitute for plaintiff's actual damages.*" *Minihane*, *supra*, at n.6 (describing Cummings's enforceable liquidated damages provision; emphasis supplied). *See also* Decision (Add. at 58) ("Cummings's established formula . . . is a reasonable estimation of damages because Hines would not pay more than what he would have paid had he performed his obligations").

The Appeals Court also attempts to distinguish *National Communications* on the basis that the tenant in that case "made no attempt to show that the stipulated amount was disproportionate to a reasonable estimate of expected damages." (Add. at 58.) But Hines was guilty of the same failure, offering only post-breach circumstances to attempt to challenge the Damages Provision.[10] Inasmuch as this Court has ruled that, any

---

[10] Although it acknowledged the impropriety of engaging in a "second look," the Appeals Court did exactly that, its citation to *TAL Fin. Corp. v. CSC Consulting, Inc.*, 446 Mass. 422 (2006) notwithstanding. *TAL* involved a 36-month lease for office computer hardware and software, and included a liquidated damages provision that required a breaching party to pay, *inter alia*, a fixed figure of 18 percent of the acquisition cost *regardless* of when in the lease term a breach occurred. 446 Mass. at 429-430. Simply put, the clause at issue

reasonable doubts on the issue of enforceability of such a provision must be resolved in favor of the *non-breaching* party, *see Minihane, supra*, at 419-420, the Appeals Court's conclusion must be reversed.[11]

II. THE APPEALS COURT'S NEW TEST FOR ENFORCEABILITY CONFLICTS WITH ESTABLISHED LAW REGARDING LIQUIDATED DAMAGES AND MITIGATION.

By improperly characterizing the Damages Provision, the material features of which were upheld by this Court 15 years ago, as an "unenforceable penalty," the Appeals Court would create a direct conflict with controlling law and undermine thousands of commercial contracts. For example, just one year after *National Communications*, this Court enforced the liquidated damages provision in a New England Patriots season ticket license, following a breach by the license holder after just one year of a *10-year* license. *See Minihane*, 451 Mass. at 423-424. This Court expressly determined that the issue of "mitigation" was

---

in the Cummings leases markedly differs from that in TAL, which "[f]ail[ed] to provide any recognition for the . . . timing of the default." *Id.* at 432.

[11] The Appeals Court's citation to *A-Z Servicenter, Inc. v. Segall*, 334 Mass. 672 (1956) is also inapposite. That case involved an acceleration provision found in a mortgage note which provided not only for acceleration of principal, but for 15 years' worth of unearned interest in the event of a breach. The SJC declined to enforce the clause as to "future interest." *Id.* at 677.

"irrelevant" and "not [to] be considered in assessing damages." *Id.* at 423. The SJC explained:

> [w]hen parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the peace of mind and certainty of result afforded by a liquidated damages clause.

Id. (internal quotation omitted).[12]

Yet the liquidated damages provision in *Minihane* cannot be squared with the Appeals Court's abrupt revision to current law because it neither "included either some accounting to the [breaching party] for any [amounts] received from a new [licensee] or some discounting of the stipulated damages to reflect the likelihood of [resale]."[13] (Add. at 37.) Simply put, the Appeals Court's ruling calls into question *all* liquidated damages provisions modeled upon the Patriots or Cummings paradigm.

---

[12] The parties could have agreed prior to signing their lease that rent received by landlord following a lessee default could have been applied to offset the rental damages. Here, they did not.

[13] If anything, the provision in *Minihane* was even more straightforward than the Cummings provision, as it expressly recited that the Patriots "shall have no duty to mitigate any damages incurred by [them] as a result of a default by Licensee." 451 Mass. at 419 n.3. Like the Cummings provision, however, the *Minihane* clause included a "sliding scale" of damages, which would be reduced as the termination date of the contract approached.

The Appeals Court's decision also blurs the distinction between indemnification and liquidated damages. In *275 Washington Street Corp. v. Hudson River Int'l, LLC*, for example, this Court specifically cited Cummings's liquidated damages clause as a "typical" liquidated damages provision in commercial leases, and contrasted it to one providing for indemnification, which "does not provide for liquidation of damages . . . but instead requires a defaulting tenant to reimburse the landlord for actual losses from termination of a lease." 465 Mass. 16, 22 (2013) (internal quotation omitted). By striking down the Damages Provision and determining that "Cummings is not entitled to liquidated damages . . . [but] actual damages," (Add. at 43), the Appeals Court has conflated two distinct legal remedies, rendering both questionable in their vitality.

The approach adopted by the Appeals Court creates further complications. If Lessors who obtain a "final" judgment and successfully enforce all or some part of said judgment against the breaching tenant are required, years later, to provide the former tenant with a "credit" based upon rental payments received from replacement tenants, any number of problems could ensue. The prior tenant may no longer exist - whether voluntarily (*i.e.*, dissolution) or involuntarily (*i.e.*, bankruptcy). To whom, then, ought the credit be provided? How are lessor's costs to re-let to be assessed, particularly if the premises needs refurbishing or rebuilding/improving to suit a new tenant's needs. What if the replacement tenant defaults? What if actual damages exceed liquidated damages? These and other uncertainties, all of which relate to "mitigation" - an issue the SJC unequivocally declared "irrelevant" in such cases - directly undermine the "peace of mind and certainty of result" intended and afforded by such estimated damages provisions, which had been agreed to by the parties. *NPS, supra*, at 423. The Appeals Court's opinion cannot stand.

CONCLUSION

For the reasons contained in this Application, the Supreme Judicial Court should grant further appellate review of the December 5, 2022 opinion of the Appeals Court pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure.

Respectfully submitted,

CUMMINGS PROPERTIES, LLC
By its attorney,

Joseph P. Mingolla

Joseph P. Mingolla
BBO#631287
200 West Cummings Park
Woburn, MA 01801
781-935-8000
legal@cummings.com

Dated: December 20, 2022

ADDENDUM

ADDENDUM TABLE OF CONTENTS

21-P-1153 Appeals Court

CUMMINGS PROPERTIES, LLC vs. DARRYL C. HINES.

No. 21-P-1153.

Middlesex. September 9, 2022. - December 5, 2022.

Present: Shin, Hand, & Brennan, JJ.

Real Property, Lease. Contract, Lease of real estate, Rent acceleration clause, Provision for liquidated damages. Damages, Liquidated damages, Mitigation. Guaranty. Penalty.

Civil action commenced in the Superior Court Department on January 6, 2020.

The case was heard by Christopher K. Barry-Smith, J.

Joseph B. Simons for the defendant.
Joseph P. Mingolla for the plaintiff.

SHIN, J. At issue in this appeal is whether a rent acceleration clause in a commercial lease is enforceable as a liquidated damages provision or unenforceable as a penalty. After the tenant defaulted on paying rent just two months into a five-year lease, the landlord, Cummings Properties, LLC (Cummings), brought suit in the Superior Court against the guarantor of the lease, Darryl Hines, seeking to recover the remaining rent as liquidated damages. Although Cummings was able to relet the property less than one year after the tenant's default, Cummings claimed that it was still entitled to liquidated damages equal to the amount of rent due under the full term of the lease. Following a jury-waived trial, the judge agreed, and judgment entered accordingly. We conclude that the acceleration clause is an unenforceable penalty and thus reverse.

Background. The relevant facts are uncontested. Hines is the owner and the sole officer and director of Massachusetts Constable's Office Inc. (MCO), a company that provides process service. Before founding MCO, Hines, a self-taught tax preparer and accountant, operated a tax-preparation business out of a small office he rented from a noncommercial landlord in Salem. Hines later began operating MCO out of the same office.

In early 2016 MCO secured a contract with the Department of Revenue (DOR). This led Hines to seek out new office space in Woburn, where he anticipated that the majority of MCO's business with DOR would occur. Cummings owns over eleven million square feet of commercial real estate in Woburn, including offices near DOR.

On April 15, 2016, MCO and Cummings entered into a commercial lease for MCO to occupy one of Cummings's Woburn properties (premises). The term of the lease was five years, beginning on June 1, 2016, and the base rent was $16,374 per year. While the rent was payable in monthly instalments of $1,364.50, paragraph E of the lease included the following "[d]efault; [r]emedies" clause, which allowed Cummings to both terminate the lease and accelerate the rent if MCO defaulted on a payment and failed to cure within ten days:

> "In the event that . . . LESSEE defaults in the observance or performance of any term herein, and such default is not corrected within 10 days after written notice thereof, then LESSOR shall have the right thereafter, without demand or further notice, to declare the term of the lease ended, and/or to remove LESSEE's effects, without liability, including for trespass or conversion, and without prejudice to any other remedies. If LESSEE defaults in the payment of any rent, and such default continues for 10 days after written notice thereof, and, because both parties agree that nonpayment of said sums is a substantial breach of the lease, and, because the payment of rent in monthly installments is for the sole benefit and convenience of LESSEE, then, in addition to any other remedies, the net present value of the entire balance of rent due herein as of the date of LESSOR's notice, using the published prime rate then in effect, shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach."

Hines signed the lease on behalf of MCO. He also signed a personal guaranty, which obligated him to "personally and unconditionally guarantee[] the prompt payment of rent by LESSEE and the performance by LESSEE of all financial and nonfinancial obligations arising out of . . . this lease."

Less than a month after the lease was executed, DOR suspended its contract with MCO. With MCO now in financial straits, Hines contacted Cummings to explore his options with regard to the lease. Cummings refused to release MCO from the lease but did allow MCO to pay the security deposit of $2,700 in three equal instalments. The agreement was memorialized in an amendment to the lease executed by the parties on June 13, 2016.

In July 2016, the second month of the lease, MCO defaulted on its rent payment. Cummings then gave written notice to MCO in accordance with paragraph E of the lease, warning that failure to pay the rent due within ten days "shall result in the automatic termination of the lease without further notice," eviction, and liquidated damages owed to Cummings in the amount of $74,076.24. After MCO failed to timely cure the default, Cummings promptly filed a summary process action against MCO in the Woburn Division of the District Court Department. In its complaint Cummings sought possession of the premises and damages of $74,076.24, representing rent owed for July and August 2016 plus the "[n]et present value of future rent owed pursuant to commercial lease."

In August 2016 Cummings and MCO resolved the summary process action through an agreement for judgment, which provided that judgment would enter for Cummings on both possession and damages, that MCO would waive all rights of appeal, and that an execution would issue immediately. Hines was the signatory on the agreement for MCO, which was not then represented by counsel. Judgment entered in the District Court in accordance with the agreement, awarding Cummings possession and $74,076.24 in damages.[1]

Sometime in the spring of 2017, about one year into the original five-year lease term, Cummings signed a four-year lease with a new tenant and relet the premises.[2] Nonetheless, in January 2020, Cummings initiated this action against Hines as guarantor of the original lease, seeking to recover all of the rent due under the remainder of the five-year term.[3] After the jury-waived trial, the judge issued a thoughtful written decision, in which he first concluded that Hines was "sufficiently sophisticated" to be held to the terms of the

---

[1] MCO later retained an attorney, who moved to vacate the District Court judgment and to recall the execution on the ground that MCO had been unrepresented by counsel. That motion was unsuccessful, for reasons not apparent on this record. But see Varney Enters., Inc. v. WMF, Inc., 402 Mass. 79, 82 (1988) (with exception of small claims proceedings, "corporations must appear and be represented in court, if at all, by attorneys"). In any event, at trial in this case, Cummings disavowed any reliance on the District Court judgment, stating that it was pursuing only its rights under the lease and the guaranty.

[2] The record does not reveal the amount of rent paid by the new tenant. This is not material to our decision.

[3] As of October 6, 2016, the unpaid balance of the District Court judgment was $68,650.24. MCO made no further payments after that date.

lease, including the rent acceleration clause. Then, construing the acceleration clause as "requir[ing] damages equivalent to the amount owed during the full term of the contract," the judge concluded that it was an enforceable liquidated damages provision because the stipulated sum was a reasonable estimate of Cummings's anticipated damages. Judgment then entered for Cummings in the amount of $82,143.01, comprising damages, prejudgment interest, and costs.

Discussion. On appeal from a judgment after a jury-waived trial, we accept the judge's findings of fact unless clearly erroneous but review de novo the judge's conclusions of law. See T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 569 (2010). Whether a rent acceleration clause is an enforceable liquidated damages provision or an unenforceable penalty is a question of law. See NPS, LLC v. Minihane, 451 Mass. 417, 419 (2008). We therefore consider it de novo.[4]

---

[4] While the parties appear to agree that the acceleration clause is only enforceable against Hines if he meets some baseline level of "sophistication," they disagree on whether that question is one of fact or law. Also, neither party has supplied a test for determining sophistication, and we have found no guidance on that issue in Massachusetts case law. See, e.g, Cummings Props., LLC v. National Communications Corp., 449 Mass. 490, 495 (2007) (National Communications) (noting "near unanimous trend toward upholding liquidated damages clauses in agreements between sophisticated parties," but not elaborating on what it means to be "sophisticated"). As the facts here demonstrate, an "I know it when I see it" approach, suggested by Cummings at oral argument, would be neither principled nor workable. On the one hand, as the judge found and Hines does

"A rent acceleration clause, in which a defaulting lessee is required to pay the lessor the entire amount of the remaining rent due under the lease, may constitute an enforceable liquidated damages provision so long as it is not a penalty." Cummings Props., LLC v. National Communications Corp., 449 Mass. 490, 494 (2007) (National Communications). See TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431 (2006) ("It has long been the rule in Massachusetts that a contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty"). The burden was on Hines, as the party seeking to set aside the acceleration clause, to prove its unenforceability. See National Communications, supra at 494-495. Barring this, Hines is liable for the remaining rent owed by MCO because his obligations as guarantor are coextensive with those of MCO under the lease. See 275 Washington St. Corp. v. Hudson River Int'l, LLC, 465

---

not contest, Hines was at least sophisticated enough "to understand the concepts and consequences of a commercial lease." But on the other hand, the judge found that Hines was not "highly" sophisticated, had no prior experience negotiating commercial leases, was not represented by counsel during the negotiations, and did not actually understand all of the lease terms, including the acceleration clause. Ultimately, although we agree with Hines that there was an obvious disparity in bargaining power, we need not reach the question of sophistication because we conclude that the acceleration clause is unenforceable on other grounds.

Mass. 16, 30 (2013) ("the liability of the guarantor cannot exceed the liability of the debtor").

Although "[t]here is no bright line separating an agreement to pay a reasonable measure of damages from an unenforceable penalty clause," a liquidated damages provision will generally be enforced if (1) "at the time the agreement was made, potential damages were difficult to determine," and (2) "the clause was a reasonable forecast of damages expected to occur in the event of a breach." TAL Fin. Corp., 446 Mass. at 431-432. Only the second of these conditions is at issue in this case.[5] In determining whether it has been met, we must "examine only the circumstances at contract formation" (the "single look" approach) and not the circumstances at the time of breach (the "second look" approach). Kelly v. Marx, 428 Mass. 877, 880-881 (1999). Liquidated damages that are "'grossly disproportionate to a reasonable estimate of actual damages' made at the time of contract formation" are invalid on grounds of public policy. Id. at 880, quoting Lynch v. Andrew, 20 Mass. App. Ct. 623, 628

[5] In National Communications, 449 Mass. at 496, the court, considering a similar rent acceleration clause in another of Cummings's commercial leases, concluded that the first condition was met because "the parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at that time, or what the cost of finding another tenant and the length of time the property might remain vacant might be." Hines does not contend that the facts here warrant a different conclusion.

(1985). Even where the stipulated sum is "designated in the contract as liquidated damages," "[i]f from the nature of the transaction and the attending circumstances it appears that the contract is a cloak to hide a sum of money out of proportion to and differing greatly from the actual damages ordinarily arising from a breach, then the sum named . . . is a penalty." A-Z Servicenter, Inc. v. Segall, 334 Mass. 672, 675 (1956). See Restatement (Second) of Contracts § 356(1) (1981) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty").

The award of liquidated damages here cannot stand under these principles. The acceleration clause permits Cummings to retake possession of the premises, relet it and collect rent from the new tenant, and recover all the remaining rent owed by MCO, without having to account for the rent received from the new tenant during the term of the original lease. A provision such as this bears no reasonable relationship to expected damages and is thus unenforceable as a penalty. See 22 Am. Jur. 2d Damages § 545 (2013) (acceleration clause is penalty "if it allows one party to repossess and resell while still collecting the entire unpaid rental for the rest of the term from the party in default"). In so concluding, we do not engage in an impermissible "second look" at the circumstances at the time of breach. Because the acceleration clause allows Cummings to repossess and relet the premises, then at the time of contract formation a reasonable estimate of expected damages would have included either some accounting to MCO for any rent received from a new tenant or some discounting of the stipulated damages to reflect the likelihood of reletting. See Ultra Group of Companies, Inc. v. S&A 1488 Mgt., Inc., 357 Ga. App. 757, 760 (2020) (liquidated damages provision "was not a reasonable pre-estimate of the probable loss resulting from a breach" where it did not take into account possibility of rerenting). Cf. TAL Fin. Corp., 446 Mass. at 432 ("Failing to provide any recognition for the type, or timing, of the default . . . tends to indicate that the provision's intended purpose was not to estimate the different types of damages that might arise from a future default, but to penalize for any failure . . . ."). Instead, the acceleration clause requires MCO to pay the full five years of rent owed under the lease regardless of when in the lease period the default occurs and regardless of whether or when Cummings finds a new tenant. While the Supreme Judicial Court has "cautioned . . . against use of the 'second look approach,' the disparity between the stipulated sum . . . and actual damages . . . cannot be ignored in this case, because that disparity was known at the time of the agreement." Id. at 432-433.

Our conclusion is consistent with the unanimous view of other courts. The function of a rent acceleration clause is to require the tenant "to pay . . . what it agreed to pay up front for the entire term of the lease." National Communications, 449 Mass. at 497 n.9. Thus, upon payment of the accelerated rent, the tenant would be entitled to retain possession of the property. See Fifty States Mgt. Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 578 (1979) (acceleration clause "is merely a device in the landlord-tenant relationship intended to secure the tenant's obligation to perform a material element of the bargain and its enforcement works no forfeiture" so long as "the sum reserved for liquidated damages is no greater than the amount the tenant would have paid had it fully performed and . . . the tenant would be entitled to possession upon payment"); Peirce v. Hoffstot, 211 Pa. Super. 380, 384 (1967) ("The tenant . . . does not forfeit all of his rights when the landlord accelerates, but must thereafter be accorded his possessory rights on payment of the accelerated rent"). It follows then, and "the authorities agree," that if the landlord regains possession and relets the property, "the landlord may not keep both the accelerated rent and rent received from renting to a new tenant." Restatement (Second) of Property (Landlord &

Tenant) § 12.1 Reporter's note 10 (1977).[6] Cummings cites no case holding to the contrary, nor have we found one.

We disagree with Cummings's suggestion that National Communications is binding on the issue before us and requires that we uphold the judgment. While the facts of National

[6] See Quintero-Chadid Corp. v. Gersten, 582 So. 2d 685, 688-689 (Fla. Dist. Ct. App. 1991) (upon exercising acceleration clause, landlord "cannot collect the full amount due and then relet to a third person" but "must give the tenant credit for the rents received" from reletting); Ultra Group of Companies, Inc., 357 Ga. App. at 760 ("We have rejected liquidated damages clauses where the lessor received all future revenue and full possession of the property with the ability to re-rent or sell, because the liquidated damages placed the lessor in a far better position than it would have been if the contract had never been breached" [quotation and citation omitted]); Aurora Business Park Assocs., L.P. v. Michael Albert, Inc., 548 N.W.2d 153, 157 (Iowa 1996) (en banc) (acceleration clause that entitled landlord "to damages equal to the amount of rent reserved in the lease, plus any other consequential damages," was enforceable because it also required crediting of any "amounts received in reletting the property"); Frank Nero Auto Lease, Inc. v. Townsend, 64 Ohio App. 2d 65, 68-69 (1979) (acceleration clause that "permit[ted] the lessor to regain possession of the leased motor vehicle, relet or resell the motor vehicle and collect rents for the entire period of the lease" was unenforceable because it "enable[d] the lessor to receive a double payment for the leased motor vehicle and [bore] no reasonable relationship to damages actually sustained"); Ferrick v. Bianchini, 69 A.3d 642, 656 (Pa. Super. Ct. 2013) (if "commercial tenant vacates the leasehold, the landlord may seek accelerated rent if the lease so provides, and re-let the premises" but "must credit tenant at execution for sums paid by the replacement tenant"). Cf. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc., 24 N.Y.3d 528, 536 (2014) (holding that, although landlord's damages were reduced by amount of rent received from new tenant, acceleration clause was still arguably a penalty where it allowed landlord to "enjoy uninterrupted possession of the property" while collecting all rent due from former tenant "in one lump sum, undiscounted to present-day value," and remanding for taking of further evidence).

Communications are similar, the court did not address in that case whether a rent acceleration clause is a penalty if it allows the landlord to collect both the full amount of rent owed under the lease and rent from a new tenant. Rather, the issue was whether "in the case of a commercial agreement between sophisticated parties containing a liquidated damages provision applicable to breaches of multiple covenants, it may be presumed that the parties intended the provision to apply only to those material breaches for which it may properly be enforced." National Communications, 449 Mass. at 495-496. As the court specifically noted, the tenant there had made no attempt to show that the stipulated amount was disproportionate to a reasonable estimate of expected damages, offering instead "only an assertion . . . that the liquidated damages provision was an unenforceable penalty as a matter of law." Id. at 497.

We also disagree with Cummings's suggestion that it need not account for rent received from reletting because the rule in Massachusetts is that "in the case of an enforceable liquidated damages provision, mitigation is irrelevant and should not be considered in assessing damages." NPS, LLC, 451 Mass. at 423. In Panagakos v. Collins, 80 Mass. App. Ct. 697, 703 (2011), we applied this rule in a landlord-tenant matter, stating that "[t]he combined force of [National Communications and NPS, LLC,] constrains us to conclude that the trial judge erred when he considered [the landlord's] failure to mitigate in his assessment of damages from [the tenant's] acknowledged breach of the lease." The upshot of the rule is that, if a lease contains an enforceable liquidated damages provision and the tenant defaults, the landlord can stand by and do nothing to relet the premises or otherwise mitigate damages, and the landlord still would be entitled to collect all of the rent owed by the tenant for the remainder of the lease term. See NPS, LLC, supra at 422 n.7 (noting that plaintiff had not resold defendant's luxury seat "some four years after the defendant committed a breach of the agreement"); Panagakos, supra at 701 (noting that landlord "did not lease [property] to any other tenant"). While one might question the fairness of that result, it is dictated by our case law.[7] But the cases cited by Cummings do not address the situation where, as here, the landlord does relet the property and then seeks to recover the remaining rent from the

---

[7] We note some tension in the landlord-tenant context between (a) a rule that requires no mitigation and (b) the principle that "[t]ermination of a lease ends a tenant's obligation to pay rent in the absence of any provision otherwise[and, 'i]f there is such a provision, the landlord is required to take reasonable steps to obtain a new tenant on terms that will mitigate the original tenant's liability as much as is feasible under the circumstances.'" Krasne v. Tedeschi & Grasso, 436 Mass. 103, 109 (2002), quoting Restatement (Second) of Property (Landlord and Tenant) § 12.1 comment i (1977). See National Communications, 449 Mass. at 497 (declining to address tenant's argument about mitigation because not pleaded as affirmative defense). But we view Panagakos to be binding on this issue.

original tenant as liquidated damages. The issue in this situation is not whether the landlord had a duty to mitigate, but whether the landlord is entitled to recover the liquidated damages while also collecting rent from the new tenant.

Finally, we are unpersuaded by Cummings's argument that public policy considerations -- namely, "the real-world difficulties inherent in a post-hoc 'accounting' requirement" -- warrant a different result. "Commercial leases are commonly drafted by the landlord, or its attorney, and may specify the remedy provided for a landlord's posttermination loss." 275 Washington St. Corp., 465 Mass. at 26. The cases provide numerous examples of acceleration clauses that require offsets for rents received by the landlord from reletting to a new tenant. See, e.g., Panagakos, 80 Mass. App. Ct. at 700 n.9. Cf. 275 Washington St. Corp., supra ("If the landlord wants the indemnified amount to become due once the property is relet, it may insist that the lease so provide, and identify the means to calculate the amount of indemnified loss"). Whatever practical difficulties might arise in calculating such offsets, they are outweighed by the strong public policy against terms fixing liquidated damages that are out of proportion to any reasonable approximation of anticipated harm. See TAL Fin. Corp., 446 Mass. at 432-433; Kelly, 428 Mass. at 882 & n.6; A-Z Servicenter, Inc., 334 Mass. at 675.

Conclusion. Although Cummings is not entitled to liquidated damages, it is entitled to its actual damages, as Hines conceded at oral argument. See A-Z Servicenter, Inc., 334 Mass. at 675 (where "the stipulated sum is unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive, the court will award the aggrieved party no more than his actual damages"). The judgment in favor of Cummings in the amount of $82,143.01 is therefore vacated, and the matter is remanded for further proceedings consistent with this opinion.

So ordered.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-1153

CUMMINGS PROPERTIES, LLC

vs.

DARRYL C. HINES.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

The judgment in favor of Cummings in the amount of $82,143.01 is vacated, and the matter remanded for further proceedings consistent with this opinion.

By the Court,

Joseph F. Stanton, Clerk

Date December 5, 2022.

17

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2081CV00025

CUMMINGS PROPERTIES, LLC

vs.

DARRYL C. HINES

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING JURY-WAIVED TRIAL

The plaintiff, Cummings Properties, LLC ("Cummings"), commenced this action against defendant Darryl C. Hines ("Hines") on January 6, 2020, for breach of contract, seeking enforcement of a guaranty obligation on a commercial lease. Cummings, the lessor, entered into a commercial lease agreement (the "Lease") with non-party lessee Massachusetts Constable's Office Inc. ("MCO") on April 15, 2016, and Hines, the founder and president of MCO, signed the Lease as guarantor on behalf of MCO. After MCO breached the Lease by failing to pay rent, Cummings commenced summary process in Woburn District Court to repossess the premises and the court entered a judgment in Cummings's favor for $74,076.24. The judgment represents the liquidated damages owed to Cummings in the event of MCO's breach pursuant to Paragraph E of the Lease. After application of, (i) the $2,700 security deposit (previously paid by MCO), and (ii) additional payments totaling $2,726, as of October 7, 2016, the Execution Balance totaled **$68,650.24** (the "Execution Balance"). No additional payment towards the Execution Balance has been made since October 6, 2016.

The jury-waived trial occurred over three days, from June 16, 2021 to June 18, 2021, with closing arguments on June 18, 2021. The court heard testimony from (i) David Blumberg, Cummings Properties Operations Manager, (ii) William F. Grant, Cummings Properties Chief

Financial Officer, (iii) Darryl C. Hines, the defendant, (iv) Michael Truesdale, former Cummings Leasing Director, (v) Jeffery Gregorio, former Constable with MCO, (vi) Morgan Blum, former Cummings Leasing Agent, and (vii) Rob Strasnick, Esq., prior attorney for Hines. I credit each witness's testimony unless stated below. The court also admitted 27 exhibits. The central issues to be decided involve the enforceability of the Lease's liquidated damages clause, including the threshold question whether the defendant is a sufficiently sophisticated commercial party against whom the clause may be enforced.

Set forth below are findings of fact and conclusions of law following the jury-waived trial. As detailed, Cummings has shown that the liquidated damages clause in its commercial Lease is effective and, therefore, that Hines, as guarantor on the Lease, is obligated to pay the Execution Balance.

FINDINGS OF FACT

Hines founded Massachusetts Constable's Office, Inc. and was its sole officer and director. Prior to, and during his involvement with MCO, Hines's primary income source was his tax preparation business. A self-taught accountant and tax preparer, Hines opened his own accounting business and operated out of a small office he leased in Salem, Massachusetts. Hines' landlord-tenant relationship in Salem was relatively informal. He had a month-to-month lease with a noncommercial landlord. Hines was on friendly terms with this landlord, who, as a kind gesture, provided him with a desk and chair when Hines started his tax business. Despite Hines being late on his Salem rent payments multiple times, the landlord never commenced any legal action against him, and they continued to have a friendly relationship. Later, Hines started the MCO out of that same Salem office.

MCO's business is providing service of process, for a fee, to litigants or authorities who require the service of legal process. Hines started MCO as a for-profit entity, but Hines later converted it into a non-profit. With respect to both MCO's for-profit and non-profit incarnations, Hines prepared and filed necessary paperwork with the Secretary of State to establish those corporations. Under Hines's leadership, MCO at one point managed around 10 individual constables. Hines described the constables who worked for MCO as independent contractors and not employees. Hines displayed a general familiarity with the difference between employees and independent contractors, and the implications for an employer if workers were deemed employees rather than contractors.

In early 2016, Hines sought to expand MCO and secured a government contract with the Department of Revenue ("DOR"). Hines anticipated the majority of MCO's business with DOR would originate out of Woburn where DOR was located, so Hines sought to rent out office space nearby. Cummings, one of the largest commercial landowners in Massachusetts, owns over 11 million-square-feet of commercial real estate in Woburn, including the office spaces near DOR. Hines reached out to Cummings and toured available spaces.

On April 15, 2016, Cummings and MCO entered into a five-year commercial lease agreement for MCO to occupy the premises at 100 TradeCenter Suite 715, Woburn, Massachusetts (the "premises") from June 1, 2016 until May 30, 2021. Hines, as president of MCO, signed the Lease on behalf of MCO. The Lease agreement required MCO to pay Cummings $1,364.50 each month for sixty months. Hines also signed a personal guaranty with respect to the Cummings/MCO Lease. The guaranty, signed by Hines, in relevant part obligated him to "personally and unconditionally guarantee[] the prompt payment of rent by [Lessee] and the performance by [Lessee] of all financial and nonfinancial obligations arising out of . . . this lease . . . ." Exhibit 1.

The Lease agreement between Cummings and MCO contained a liquidated damages clause in Paragraph E, captioned "Acceleration Provision," which in relevant part states:

> If LESSEE defaults in the payment of any rent, and such default continues for 10 days after written notice thereof . . . then, in addition to any other remedies, the net present value of the entire balance of rent due . . . shall immediately become due and payable as liquidated damages, since both parties agree that such amount is a reasonable estimate of the actual damages likely to result from such breach.

Exhibit 1. Paragraph L of the Lease states, "[t]he lease and these terms shall not be amended except by written agreement signed by both parties."

Less than a month after Hines signed the Lease, DOR suspended its contract with MCO. Shortly after, Hines reached out to Cummings's representatives and shared that MCO was experiencing financial difficulties in light of the lost contract. Hines wanted to know what MCO's options were with regards to the Lease. Cummings communicated with Hines that they might have some flexibility but did not release MCO from the Lease. MCO had not yet furnished the deposit required and Cummings agreed to allow MCO to pay the deposit in multiple installments, rather than one lump sum as Cummings typically required.

On the second month of the Lease, July 2016, MCO failed to pay Cummings rent on the premises. On July 12, 2016, Cummings sent MCO a "Notice of Rent Due," providing MCO ten days to cure the default. MCO failed to cure the default within the required ten days of the notice. In August 2016, Cummings commenced summary process against MCO in Woburn District Court (the "eviction action"). On August 17, 2016, Cummings and MCO jointly signed an Agreement for Judgment which stated: (i) Cummings had the right to reposes the premises immediately, (ii) Cummings was entitled to damages of $74,076.24, and (iii) MCO waives all rights of appeal. MCO was not represented by counsel during the eviction action. On August 23, 2016, the District Court entered judgment in favor of Cummings against MCO in the amount of $74,076.24. On September 2, 2016, the Woburn District Court issued an Execution in favor of Cummings against Lessee in the amount of $74,319.95. During the eviction action, Hines was under considerable stress, including financial stress. In addition to losing the DOR contract, Hines was defending himself against criminal charges that arose out of his operation of MCO.. Hines wanted MCO to keep the Woburn office space because he hoped the DOR contract would be revived and that MCO eventually would catch up on its missed rental payments. DOR, however, never renewed the contract and MCO never returned to occupy the leased premises.

From July 2016 and until October 6, 2016, MCO, authorized by Hines, paid Cummings an additional $2,726. After deducting the payments totaling $2,726, and the security deposit of $2,700, the Execution balance totaled $68,650.24. No additional payments have been made since October 6, 2016.

A few months after the Woburn District Court action was complete, Hines retained Attorney Robert Strasnick to represent MCO in connection with the judgment and execution entered in the Woburn District Court. Attorney Strasnick filed a verified motion to vacate judgment and recall the execution, arguing that the absence of an attorney representing MCO in the district court proceedings warranted vacating the judgment. The court did not vacate the judgment or recall the execution. Cummings did not collect additional monies from MCO after October 2016.

Although he was unable to pay the rent required under the Lease agreement, Hines remained cooperative with Cummings. He eventually vacated the premises in an orderly fashion and responded to Cummings' requests in that regard and with respect to left-behind equipment and furniture. Hines testified that, during communications with Cummings representatives about MCO's default and its eventual departure from the leased premises, Morgan Blum, a leasing agent for Cummings, promised that if MCO and Hines vacated the premises in an orderly fashion, then Cummings would not "come after" Hines for additional money due under the Lease. I do not credit this testimony. This alleged promise was disavowed by Blum and other Cummings witnesses, is inconsistent with the emails written by Blum and other Cummings agents, and is wholly inconsistent with the business approach carried out by Cummings' agents. Cummings may demonstrate some flexibility to accommodate tenant difficulties, but it would not waive its rights under its lease agreements, informally and verbally. Neither Blum nor any other Cummings agent promised Hines that Cummings would not enforce its rights under the Guaranty or the Lease.

Sometime in the spring of 2017, about one year into the five-year term of the Cummings/MCO Lease, Cummings secured a four-year lease with a new tenant and relet the premises.

Cummings nonetheless seeks to enforce its contractual right to all five years' worth of rent under its lease with MCO, as guaranteed by Hines. On January 6, 2020, Cummings filed a complaint against Hines listing one count of breach of contract seeking enforcement of the guaranty obligation signed by Hines.

Because Hines argues that liquidated damages clauses are enforceable only between sophisticated business parties, both sides presented evidence concerning Hines' sophistication as a business person. Both parties elicited evidence supporting their position, summarized below.

Relevant to Hines' contention that he was not a sophisticated business person and should not be bound by the written terms of the Lease, including the acceleration clause, Hines points to the following: At the time the Lease was signed, Hines lacked prior experience in negotiating commercial leases with large commercial landowners like Cummings. The office space Hines leased in Salem for his accounting business was under a more informal arrangement with a noncommercial landlord. Hines credibly testified that he did not read the Lease or the Guaranty carefully and that he did not understand all the terms, including the acceleration clause. Further, Hines and MCO were not represented by counsel during the Lease negotiation with Cummings nor during the subsequent eviction action. Although Hines acknowledges that he operates his own tax preparation business, he testified that tax preparation is not especially complicated. He relies on software to assist tax preparation, which does not require an advanced degree and can be self-taught. Hines likewise testified that his completion and submission of corporate forms to form LLC's and corporations was not complex because there are clear step-by-step guidelines, and many forms can be filed online.

Gregorio, a prior constable with MCO, also testified to Hines' lack of sophistication. Gregorio noted that he, and most people, could enter the constable business with relative ease. Gregorio said he worked as a constable with MCO largely part-time because Hines was still growing MCO, and broadly, that MCO was never an established and stable enterprise. Gregorio observed that Hines was overwhelmed when the contract with DOR was suspended, and how Hines was unsure of what to do.

Cummings points to other facts in evidence showing that Hines was a sophisticated business person, or at least sophisticated enough that he should be held to the written terms of the Lease. Hines held himself out to the public as a knowledgeable entrepreneur, one who could be trusted with the details and complexities of tax preparation. Hines started at least two businesses. In addition to filing the necessary corporate forms to establish MCO, Hines also converted MCO from a for-profit to a nonprofit. Adhering to these corporate formalities, particularly determining to convert a business from for-profit to nonprofit, demonstrates some facility for business management and planning. Hines also held multiple positions in MCO simultaneously, as Chairman, President, Treasurer, CEO, and Assistant Clerk. Hines had the wherewithal to seek out then negotiate a government contract with DOR, a process that likely included reviewing contract language and negotiating terms with government representatives. Those same skills are relevant to negotiating commercial leases. Hines also participated in networking with other professionals, both for purposes of business development and because he appreciated the benefits of having acquaintances in a variety of professional fields.

As discussed further below, although I do not find that Hines was a *highly* sophisticated business person, I find he was *sufficiently* sophisticated to be held to the provisions of the contract he signed. He established and ran both a tax preparation and constable business, he adhered to various corporate formalities with respect to identifying himself as director and officer of MCO, he negotiated a contract with DOR in hopes of expanding his existing business, he saw fit to alter MCO's corporate status from for-profit to non-profit, and he sought to network with other professionals to learn from them. It is fair to require Hines to understand and adhere to the terms of the contract he struck as a business owner, officer, and manager.

RULINGS OF LAW

Overview

Massachusetts law regarding guaranties and liquidated damages clauses is well established. Guaranties are considered the same as all other contracts, and "[w]hen the words of the guaranty 'are clear they alone determine the meaning.'" *Wells Fargo Bus. Credit* v. *Environamics Corp.*, 77 Mass. App. Ct. 812, 816 (2010) (citing *Federal Fin. Co.* v. *Savage*, 431 Mass. 814, 817 (2000)). A guarantor is bound by the same terms as the underlying contract and the guarantor's scope of liability is determined by "the underlying liability that he has guaranteed." *Cedar-Fieldstone Marketplace, L.P.* v. *T.S. Fitness, Inc.*, 93 Mass. App. Ct. 33, 36

(2018) (noting guarantee clause was "absolute and unconditional" and holding defendant-guarantor liable for tenant's unpaid rent).

Massachusetts precedent views favorably the enforcement of liquidated damages clauses, at least as between sophisticated business parties. In a seminal case concerning liquidated damages clauses, and the same plaintiff, Cummings Properties LLC, the Supreme Judicial Court has mandated upholding these clauses, "[i]f, at the time the contract was made, actual damages were difficult to ascertain and the sum agreed on by the parties as liquidated damages represents a reasonable forecast of damages expected to occur in the event of a breach . . . ." *Cummings Props., LLC* v. *Nat'l Communs. Corp.*, 449 Mass. 490 (2007); see also *NPS, LLC* v. *Minihane*, 451 Mass. 417 (2008) (citing *Cummings Props., LLC*, 449 Mass. 490) (reaffirming the strength of liquidated damages provisions and holding defendant liable for ten-years-worth of stadium season tickets despite only attending two games).

Here, the basic facts concerning the Lease, the guaranty and the breach are not in dispute: Hines signed the Lease for MCO, signed the guaranty for himself, and MCO breached the Lease by failing to pay rent after just two months of a sixty-month lease. Accepting those facts, Hines argues that the underlying liquidated damages clause should not be enforced because: (i) Hines was not a sophisticated party at the time he signed the Lease on behalf of MCO,[1] and (ii) the liquidated damages provision does not conform to Massachusetts precedent because it is not a reasonable estimate of anticipated damages and thus constitutes a penalty. Previously, Hines

[1] I agree with Hines that, because the precedent concerning liquidated damages clauses routinely refers to sophisticated business parties, it is a premise to the case law that favors enforceability of liquidated damages that the clause was signed by sophisticated business persons.

also referenced other defenses against enforcing the liquidated damages provision, but Hines did not materially advance them at trial.[2]

A. Requisite Sophistication of Party to a Commercial Lease

Hines asserts he was not a sophisticated commercial party at the time he signed the Lease agreement and cites *Cummings Props., LLC*: "in the case of a commercial agreement *between sophisticated parties* containing a liquidated damages provision application to breaches of multiple covenants, it may be presumed that the parties intended the provision to apply only to those material breaches for which it may properly be enforced." 449 Mass. at 496 (emphasis added).

Hines did not cite to caselaw to help demonstrate he is not sufficiently sophisticated, rather he directed the court to the following in support of his claim: (i) he lacked prior experience in negotiating commercial leases, (ii) he did not read the Lease or Guaranty carefully and did not understand all the terms, (iii) MCO was unrepresented by counsel during the Lease negotiation and subsequent eviction action, and (iv) the businesses he started, including tax preparation, were not especially complicated.

Although there is no clear rule in Massachusetts to determine whether a party is "sophisticated" with regard to commercial lease agreements, courts generally focus on a party's

[2] Namely, Hines argued that MCO could not have properly agreed to the judgement because MCO was not represented by legal counsel, and that he was under duress when he signed the Agreement for Judgment. However, these arguments are misplaced. The Lease terms allow Cummings to seek enforcement of the guaranty clause, regardless of MCO's release from liability. Exhibit 1 ("any compromise or release of [MCO's] liability under this lease, with or without notice to [Guarantor] . . . shall not relieve Guarantor from personal liability."). Additionally, Hines argued the lease as well as the agreement for judgment were signed under duress. He testified that his stress originated from his pending criminal charges and the suspension of the DOR contract. However, "the assertion of duress must be proved by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities," and Hines has not shown that Cummings acted wrongfully. *Cabot Corp.* v. *AVX Corp.*, 448 Mass. 629, 638 (2007) (citations omitted). Finally, it is not a defense for Hines to assert that he did not carefully read all provisions of the contract. A signatory to a contract is bound by its terms even if he did not carefully read each provision. *Miller* v. *Cotter*, 448 Mass. 671, 680 (2007) (citing *Wilkisius* v. *Sheehan*, 258 Mass. 240, 243 (1927) and *Grace* v. *Adams*, 100 Mass. 505, 507 (1868)) ("absent fraud, a party's failure to read or understand a contract provision does not free him from its obligations").

past experience and understanding of the contracting process when considering whether to hold parties liable to a contract. See *Comprops Ltd. P'ship* v. *Spangenberg Grp.*, 27 Mass. L. Rep. 171 (2010) (holding defendant liable to commercial lease terms where he was educated as an attorney and was "familiar with general circumstances of a lease of the premises"); *Krumholz* v. *AJA, LLC*, 691 F. Supp. 2d 252, 2010 WL 103887 at *3 (D. Mass. 2010) (where one plaintiff already owned a small business and the other plaintiff was an attorney, plaintiffs "understood and voluntarily agreed to the contract at issue" and therefore were "bound by the contractual language to which they agreed").

Here, Cummings correctly emphasizes that Hines held himself out to the public as a knowledgeable entrepreneur, one who is experienced in preparing complicated and detailed forms. Hines started at least two businesses, navigated various corporate formalities, and held multiple positions simultaneously. Hines also negotiated and successfully secured a government contract on behalf of MCO. Depending on one's perspective, this background and experience may or may not qualify Hines as a "sophisticated" business person. The context of this inquiry here, however, is whether Hines is sufficiently sophisticated to understand the concepts and consequences of a commercial lease—whether he is sufficiently sophisticated to be required to conform to the written terms of a lease he signed. With that context, I conclude that Hines was sufficiently sophisticated to be held to the terms of his written contract, including the liquidated damages clause.

B. Enforceability of Liquidated Damages Clause

Massachusetts law broadly favors enforceability of liquidate damages clauses:

> [a] contract provision clearly and reasonably establishing liquidated damages should be enforced so long as it is not so disproportionate to anticipated damages as to constitute a penalty. If, at the time the contract was made, actual damages were difficult to ascertain and the sum agreed on by the parties as liquidated

> damages represents a reasonable forecast of damages expected to occur in the event of a breach, it will usually be enforced.

Cummings Props., LLC, 449 Mass. at 494. Where the liquidated damages represent "the agreed rental value of the property over the remaining life of the lease, decreasing in amount as the lease term came closer to expiration, [then] it appears to be a reasonable anticipation of damages that might accrue from the nonpayment of rent." *Id.* at 496. In other words, if a defendant is not required to pay more than the total amount he would have paid had he performed his obligations under the agreement, the liquidated damages clause is not a penalty and bears a reasonable relationship to the anticipated actual damages resulting from a breach. *NPS, LLC*, 451 Mass. at 417. In *Panagakos* v. *Collins*, 80 Mass. App. Ct. 697 (2011), the Appeals Court noted the combined force of *NPS* and *Cummings* and overturned a trial court's consideration of mitigated damages when it assessed the disproportionality of actual damages to the liquidated damages provision. Where a liquidated damages provision is enforceable, "mitigation is irrelevant and should not be considered in assessing damages." *Panagakos* v. *Collins*, 80 Mass. App. Ct. 697, 703, (2011) (citing *NPS, LLC*, 451 Mass. 417 and *Cummings Props., LLC*, 449 Mass. 490).

Here, because of losing the DOR contract, MCO and Hines's financial struggles began less than a month after signing the Lease. MCO and Hines had not even regularly occupied the leased premises. They had difficulty paying the up-front security deposit, so Cummings was aware of MCO's financial challenges from the very outset of the Lease term. Hines reached out to Cummings to ask about his options, and Cummings communicated and negotiated with Hines regarding his deposit but did not release MCO from the Lease. On only the second month of a five-year lease, MCO breached. From June 2016 until October 2016, Hines testified he occupied the premises between a total of 10-15 times. Holding Hines responsible for the $68,650.24 balance on a five-year lease understandably may appear to be a harsh result, particularly given that MCO barely occupied the premises and Cummings was able to find new tenants readily. However, the appellate courts addressed very similar circumstances and held that a liquidated damages clause that requires damages equivalent to the amount owed during the full term of the contract is a reasonable estimate of uncertain damages and therefore enforceable. See *Cummings Props., LLC*, 449 Mass. at 496; *NPS, LLC*, 451 Mass. at 417. Cummings's liquidated damages clause must be upheld.

I have considered carefully whether such a 'full-term' liquidated damages clause qualifies as a "reasonable forecast of damages expected to occur in the event of a breach"[3] when it fails to account for the landlord's *actual* experience in connection with mitigating damages following of leasehold breaches. After all, this "forecast" presumes, in *all* circumstances, that Cummings will *never* lease the subject premises to another tenant, regardless when in the contract term the breach occurred. Yet, Cummings is a highly sophisticated commercial landlord which undoubtedly possesses detailed historical data—spanning many years and hundreds of commercial properties—reflecting Cummings' *actual experience* in mitigating damages following a breach. In other words, Cummings *knows* whether it typically takes two months or two years to re-lease a property following a breach, and *knows* whether and how its 'mitigation' abilities are impacted by the timing of a breach within the lease term. The question is whether a forecast of uncertain damages can be *reasonable* when it fails to account for a landlord's *actual* mitigation experience and instead presumes the worst, i.e., that zero mitigation will occur (even if, as here, nearly five years remained on the lease). Although I can imagine circumstances—and actual trial evidence—that could support this type of challenge to whether the parties' forecast of expected damages was reasonable, that type of evidence is not before me in this case. Moreover,

[3] *Cummings Props., LLC*, 449 Mass. at 494.

Massachusetts precedent poses a high hurdle for such a granular attack on whether a liquidated damages clause qualifies as a reasonable forecast. The *uncertainty* that serves as the premise to uphold liquidated damages is more general: the parties do not know if or when a tenant might breach, or the condition of the relevant market at the point of breach, or the resources necessary to re-let the space. That uncertainty appears to suffice to support a full-term liquidated damages clause. It is not clear that the appellate courts would demand more, or entertain the more precise argument that a particular landlord's forecast of damages is unreasonable because it fails to account for that landlord's historical mitigation experience. Among other issues with this approach, a sophisticated business lessee presumably could negotiate for a more fair or historically accurate liquidated damages clause. In any event, although I have considered this type of challenge to a liquidated damages clause, the evidence in this case does not support it.

Here, at the time MCO and Cummings contracted, calculating actual damages was sufficiently uncertain because neither party could reasonably estimate, if or when, a breach would occur. Cummings's established formula (that calculates the remaining rent due on a lease, discounting the amount already paid) is a reasonable estimation of damages because Hines would not pay more than what he would have paid had he performed his obligations. See *Cummings Props., LLC*, 449 Mass. at 496; *NPS, LLC*, 451 Mass. at 417. Furthermore, although Cummings did find a new tenant to take over Hines' lease towards the beginning of 2017 (and received rent on the premises for four years), this mitigation is "irrelevant" to analyzing the disproportionality of Cummings's actual damages and thus cannot be considered. See *Panagakos*, 80 Mass. App. Ct. at 703.

Accordingly, these factual findings and conclusions of law support Cummings' claim that Hines is liable as guarantor for MCO's breach of contract and that Hines is obligated to pay the execution balance of $68,650.24.

ORDER FOR JUDGMENT

Based on the foregoing, it is hereby **ORDERED** that judgment enter for plaintiff in the amount of $68,650.24, plus interest and costs as provided by law, against defendant Darryl Hines.

DATE: August 13, 2021

Christopher K. Barry-Smith
Justice of the Superior Court

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Mass. R. App. P. 16(k) that the foregoing Application for Further Appellate Review complies with the applicable rules of court pertaining to the filing of briefs and appendices, including:

Rule 16(a)(13) (addendum);
Rule 16(e) (references to record);
Rule 16(h) (length of brief);
Rule 18 (appendix to briefs);
Rule 20 (type size, margins, and form of brief and appendix); and
Rule 21 (redactions).

Dated this 20th day of December, 2022

/s/ Joseph P. Mingolla
Joseph P. Mingolla

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(d), I hereby certify that on December 20, 2022 I made service of the foregoing Application for Further Appellate Review upon the following counsel for Appellant:

Joseph B. Simons, Esq.
Simons Law Office
10 Post Office Square, Suite 800
Boston, MA 02109
joe@jbsimons law.com

/s/ Joseph P. Mingolla
Joseph P. Mingolla
Cummings Properties, LLC
200 West Cummings Park
Woburn, MA 01801
BBO# 631287
781-935-8000
jpm@cummings.com